55648-7

55648-7

NO. 55648-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

79506-1

SUSAN E. RIVAS,

Respondent,

vs.

OVERLAKE HOSPITAL MEDICAL CENTER; OVERLAKE INTERNAL MEDICINE ASSOCIATES,

Defendants,

and

EASTSIDE RADIOLOGY ASSOCIATES; OVERLAKE IMAGING; WASHINGTON IMAGING SERVICES,

Appellants,

and

ROBERT L. DAVIDSON, M.D., and JANE DOE DAVIDSON, his wife, and the marital community thereto,

Defendants,

and

ALLAN MURAKI, M.D. and JANE DOE MURAKI, his wife, and the marital community thereof,

Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Steven Scott, Judge

REPLY BRIEF OF APPELLANTS

Address:
Two Union Square
601 Union Street, Suite 1500
Seattle, WA 98101-1363
(206) 292-4900

REED McCLURE
By Pamela A. Okano
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Page

Statutes

Other Authorities

069237.097021/118052

I. INTRODUCTION

Plaintiff misconceives what this appeal is about. Most of her brief assumes that defendants sought this appellate proceeding to argue that the limitations period could not be tolled under RCW 4.16.190 unless plaintiff had been adjudged incompetent or disabled ***in a guardianship proceeding.***[1] But that is ***not*** what defendants are arguing in this appeal.

The statute at issue, RCW 4.16.190, provides:

> If a person entitled to bring an action mentioned in this chapter . . . be at the time the cause of action accrued . . . incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, ***such incompetency or disability as determined according to chapter 11.88 RCW*** . . . the time of such disability shall not be a part of the time limited for the commencement of action.

(Emphasis added.) In other words, to toll the limitations period, a person must, at the time the cause of action accrued, have met two requirements:

---

[1] *See, e.g.*. Brief of Respondent 9 ("This Court Should Dismiss the Appeal on the Issue of Whether a Person Has to be Determined Incompetent or Disabled in a Guardianship Proceeding . . . ."), 12 ("The same will be the case even if Susan had been the subject of a guardianship at the time . . ."), *id.* ("Defendant Misreads RCW 4.16.190 as Requiring a Guardianship Proceeding . . . ."), *id.* ("the legislature . . . did not intent that tolling could only occur if a Plaintiff was the subject of a guardianship petition"), 16 ("It is clear that the 1977 Amendment to RCW 4.16.190 was not intended by the legislature to engraft the entire guardianship statue [sic] and the procedures therein onto RCW 4.16.190"), 19 ("Even assuming, for the sake of argument, that a guardianship had been established for Susan . . ."), 24 ("Here, Defendant Muraki asserts that because Susan had not gone through the entire guardianship process set forth in RCW 11.88, RCW 4.16.190 could never operate . . ."), 25 ("The trial court . . . will always have to address that issue regardless of whether a guardian was appointed . . ."); 26 ("Defendant Muraki insists that no court can now decide this issue because no guardianship proceedings have ever been initiated . . .")

(1) he or she must have been incompetent or disabled as determined according to RCW ch. 11.88, and (2) the incompetency or disability must have been to the extent that he or she could not understand the nature of the proceedings. If either of these requirements is not met, the limitations period is not tolled.

This appeal concerns the first requirement—that the plaintiff have been incompetent or disabled as determined according to RCW ch. 11.88. Defendants' position in this appeal is that under RCW 4.16.190, plaintiff had to be incompetent or disabled to the extent that she would have qualified for a guardian under RCW ch. 11.88. had one been sought. Contrary to plaintiff's brief, defendants are ***not*** contending in this appeal that guardianship proceedings actually had to have been brought or that a guardian actually had to have been appointed. Thus, much of plaintiff's argument is inapposite, including but not limited to her request that this court should dismiss the appeal on the issue of whether a person must be determined incompetent or disabled ***in a guardianship proceeding***. (Brief of Respondent 9)

Plaintiff also seems to argue that factual questions exist because guardianship proceedings would not have determined her ability or inability, at the time the action accrued, to understand the nature of the

proceedings.[2] But a plain reading of RCW 4.16.190 indicates that if plaintiff was not incompetent or disabled as determined according to RCW ch. 11.88, tolling cannot occur, even if plaintiff was unable, at the time her cause of action accrued, to understand the nature of the proceedings.

Thus, even if there were factual issues as to plaintiff's ability to understand the nature of the proceedings at the time her cause of action accrued, they would be immaterial. The issue here is whether plaintiff was at that time incompetent or disabled as determined according to RCW ch. 11.88—*i.e.,* whether she would have qualified for a guardian had a guardianship proceeding been brought at the pertinent time. Under the circumstances of this case, that issue presents a question of law that should be decided in favor of defendants.

II. ARGUMENT

This court accepted discretionary review of a denial of summary judgment. The question in this case is whether the three-year medical malpractice statute of limitations provided for in RCW 4.16.350 was tolled pursuant to RCW 4.16.190 for three days while plaintiff was allegedly

---

[2] *See, e.g.,* Brief of Respondent 19 ("Even assuming . . . that a guardianship had been established . . . , these proceedings would never have answered the question posed by RCW 4.16.190—Susan's ability or inability to understand the nature of the proceedings when her cause of action occurred [sic] . . . ."

helpless in an intensive care unit.[3] The answer to this question requires interpretation of RCW 4.16.190 and the statutes it incorporates, RCW ch. 11.88. Defendants agree with plaintiff that "Statutory Interpretation is a Question the Appellate Court will address *de novo.*" (Brief of Respondent 22)

A. PLAINTIFF DID NOT SUFFER MANAGEMENT INSUFFICIENCIES OVER TIME.

RCW 4.16.190 requires that the plaintiff have suffered "incompetency or disability as determined according to chapter 11.88 RCW." RCW ch. 11.88 establishes the procedure for appointing a guardian for incapacitated persons. RCW 11.88.010(1) provides:

> The superior court of each county shall have power to appoint guardians for the persons and/or estates of incapacitated persons . . . .
>
> (a) For purposes of this chapter, a person may be deemed incapacitated as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.
>
> (b) For purposes of this chapter, a person may be deemed incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.

---

[3] Plaintiff was in the intensive care unit for four days but does not claim she was incompetent or disabled within the meaning of RCW 4.16.190 on the fourth day. (CP 109)

> (c) ***A determination of incapacity is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate.*** Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity.
>
> . . . .

(Emphasis added.) Hence, because tolling under RCW 4.16.190 requires "incompetency or disability as determined according to chapter 11.88 RCW", and because RCW ch. 11.88 requires that incapacity or disability be demonstrated by a showing of management insufficiencies over time, tolling under RCW 4.16.190 requires a showing of management insufficiencies over time.

Despite this plain and unambiguous statutory language, plaintiff claims that legislative history demonstrates that the Legislature never intended that RCW 4.16.190 require incompetency or disability over time. (Brief of Respondent 12) Plaintiff contends that the Legislature intended merely to substitute more benign wording for the offensive term "insane" in RCW 4.16.190.

If the Legislature had intended to do nothing more than eliminate the word "insane" from RCW 4.16.190, it would have amended that statute to read simply:

> If a person entitled to bring an action mentioned in this chapter . . . be at the time the cause of action accrued . . . (~~insane~~) incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings,. . . the

> time of such disability shall not be a part of the time limited for the commencement of action.

But the Legislature did not do this. Instead, it elected to specify that "such incompetency or disability [be] determined according to chapter 11.88 RCW." LAWS OF 1977, 1st EX. SESS., ch. 80, § 2.

It is inappropriate to look at legislative history when the Legislature's intent is clearly spelled out in the plain language of the statute. *Shoop v. Kittitas County,* 149 Wn.2d 29, 36, 65 P.3d 1194 (2003); *see also Snohomish County v. Citybank,* 100 Wn. App. 35, 41, 995 P.2d 119 (2000). Courts may not rewrite explicit and unequivocal statutes, but must assume that the Legislature meant exactly what it said and must apply the statute as written. *In re Estate of Black,* 153 Wn.2d 152, 162, 102 P.3d 796 (2004); *State v. Roggenkamp,* 153 Wn.2d 614, 625, 106 P.3d 196 (2005).

Under plaintiff's theory, this court should ignore the words, "as determined according to chapter 11.88 RCW," in RCW 4.16.190. But each word of a statute must be given meaning. *Roggenkamp,* 153 Wn.2d at 624. No portion of a statute should be rendered superfluous. *Cole v. Washington Utilities & Transportation Commission,* 79 Wn.2d 302, 308, 485 P.2d 71 (1971). The courts must assume that the Legislature meant

exactly what it said and must apply the statute as written. *Roggenkamp,* 153 Wn.2d at 625.

Plaintiff argues that "[i]t must be assumed that the legislature, in its 1990 Amendment to the Guardianship Statute by adding the 'over time' provision . . . was simply adding a new procedural due process requirement . . . ." (Brief of Respondent 17) Plaintiff fails to cite any persuasive authority of why such an assumption is warranted or even how the "over time" requirement is somehow pertinent to "procedural due process."

Furthermore, the "over time" requirement cannot be viewed in a vacuum. "[T]o interpret a statute, each of its provisions 'should be read in relation to the other provisions, and the statute should be construed as a whole.'" *In re Detention of Williams,* 147 Wn.2d 476, 490, 55 P.3d 597 (2002) (quoting *Weyerhaeuser Co. v. Tri,* 117 Wn.2d 128, 133, 814 P.2d 629 (1991)).

Indeed, the Legislature mandated reading RCW ch. 11.88 as a whole when interpreting RCW 4.16.190, since it amended RCW 4.16.190 to require that incapacity or disability be determined "according to ***chapter 11.88 RCW***" (emphasis added). In contrast, the Legislature amended other statutes in the same act to require merely incompetency "within the meaning of ***RCW 11.88.010***." *See, e.g.,* 1977 WASH. LAWS 1ST EX. SESS.,

ch. 80, §§ 7-8, 15 (emphasis added). The Legislature must have meant something by requiring that incompetency be determined "according to chapter 11.88 RCW" in RCW 4.16.190, but only according to RCW 11.88.010 in other statutes. "Where the Legislature uses certain language in one section, and different language in another section, there is different legislative intent." *In re Detention of J.R.,* 80 Wn. App. 947, 955-56, 912 P.2d 1062, *rev. denied,* 130 Wn.2d 1003 (1996).

Therefore, RCW 11.88.010's "over time" requirement must be read in conjunction with such provisions as—

- RCW 11.88.030(4)(a)'s requirement that a person petitioning for a guardian have up to **5 days** after filing the petition to serve notice that a guardianship proceeding has been commenced.

- RCW 11.88.040's requirement that at least **10 days'** notice be given of the hearing to appoint the guardian and that even if good cause is shown why the 10 days' notice should be reduced, ***it may not be reduced to less than 3 days' notice.***

- RCW 11.88.030(5)'s provision that the court have up to **60 days** to hear a petition for appointment of a guardian.

- RCW 11.88.090(3)'s requirement that when a petition to appoint a guardian is filed, the trial court must appoint a guardian ad litem (GAL) to represent the allegedly incapacitated person's best interests and

that the GAL has **5 days** to file and serve a statement regarding his or her qualifications.

- RCW 11.88.090(5)(f)'s requirement that the GAL must file his or her report and send copies to specified persons within **45 days** after notice of the guardianship proceeding and at least **15 days** before the hearing on the petition.

- RCW 11.88.045(4)'s requirement that the person claimed to be incompetent or disabled must be personally examined and interviewed by a physician, psychologist, or advanced registered nurse practitioner within **30 days** of that health care provider's preparing a written report.

Thus, when the Legislature specified that incompetency and disability under RCW ch. 11.88 requires "management insufficiencies over time," it could not have intended that a few days' inability to function would qualify. Plaintiff has not even attempted to explain how these other provisions of RCW ch. 11.88 would operate if persons could be eligible for a guardian based on just a few days' inability to function.

Roberts v. Pacific Telephone & Telegraph Co., 93 Wash. 274, 160 P. 965 (1916), is of no help to plaintiff. That case was not decided under a statute requiring that "incompetency or disability" be "determined according to chapter 11.88 RCW." Thus, *Roberts'* definition of "insanity"

as being incapable of transacting ordinary business is irrelevant to the instant case, since the Legislature, since 1977, has required that "incompetency or disability" under RCW 4.16.190 be "determined according to chapter 11.88 RCW."

Moreover, *Roberts* did ***not*** hold that whether a plaintiff is incompetent so as to toll the limitations period is ***always*** a factual question. In addition, the plaintiff there claimed to have been insane for three years and was required to show insanity for at least four months. Here, in contract, plaintiff claims incapacity for only three days.

Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 770 P.2d 182 (1989), does not support plaintiff's position either. There the issue was whether the appointment of a guardian for a minor who had suffered permanent brain damage that would likely require him to have custodial care for the rest of his life stopped the tolling of the limitations period under RCW 4.16.190. That is not the issue here. As discussed *supra,* defendants here are not claiming in this appeal that the actual appointment of a guardian was necessary. *Young* simply did not deal with whether the plaintiff there suffered "incompetency or disability as determined according to chapter 11.88 RCW", since there was no dispute that plaintiff was either a minor or incompetent or disabled as determined according to chapter 11.88 RCW.

B. PLAINTIFF'S SUIT WAS LATE EVEN IF THE PRIOR VERSION OF RCW CH. 11.88 APPLIES.

As discussed at pages 15-18 of Brief of Appellants, the 1990 version of RCW 11.88.010 applies. But even if plaintiff is correct that RCW 4.16.190's reference to RCW ch. 11.88 means that version of RCW ch. 11.88 in effect when RCW 4.16.190 was first amended to reference RCW ch. 11.88, the result would be the same.

When RCW 4.16.190 was first amended to require incompetency and disability to be determined according to RCW ch. 11.88, RCW 11.88.010(1) defined an incompetent person to include either a minor (which plaintiff was not) or someone:

> Incompetent ***by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity***, of either managing his property or caring for himself or both.

(Emphasis added.) At that time, RCW 11.88.010(2) defined a "disabled" person to mean:

> [A]n individual who is in need of protection and assistance ***by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity***, but cannot be found to be fully incompetent.

(Emphasis added.)

No one claims plaintiff suffered from mental illness, developmental disability, senility, habitual drunkenness, or excessive use

of drugs. "Other mental incapacity" does not include all other mental incapacities, but only those mental incapacities similar to the specified disabilities. *See Sattler v. Northwest Tissue Center,* 110 Wn. App. 689, 693, 42 P.3d 440 (2002) ("other persons" does not include all other persons but only person similar to those enumerated), *rev. denied,* 147 Wn.2d 1016 (2002); *State v. Wissing*, 66 Wn. App. 745, 753, 833 P.2d 424, *rev. denied,* 120 Wn.2d 1017 (1992) ("other exhibition" does not include all exhibitions, but only those similar to those specified). The Brief of Respondent does not explain how plaintiff's condition qualified as incompetence or disability under either of these former statutes.

Even if it did, reversal would still be required. Statutes must be read as a whole, giving effect to all that the Legislature has said and using related statutes to help identify legislative intent. *In re Parentage of J.M.K.,* 155 Wn.2d 374, 387, 119 P.3d 840 (2005). Even though the Legislature in 1977 had not yet specified that incompetence or disability required management insufficiencies over time, a reading of all provisions of RCW ch. 11.88 as it existed in 1977 indicates the Legislature nevertheless intended incompetency or disability sufficient to require a guardian to be limited to a condition that lasted more than a few days.

For example, under RCW ch. 11.88 as it existed in 1977, courts had up to **45 days** to hear petitions for guardianships. 1977 WASH. LAWS

1ST EX. SESS., ch. 309, § 3(3). Not less than **10 days'** notice of the hearing had to be given. *Id.* § 4. ***A minimum of 3 days' notice was required even if good cause was shown that less than 10 days' notice was needed.*** *Id.* § 4(3). The guardian ad litem had **20 days** to furnish his or her report. *Id.* § 6(3).

Thus, a reading of the 1977 version of RCW ch. 11.88 as a whole demonstrates that it is inconceivable that the Legislature intended that a guardian could be appointed thereunder for someone like plaintiff who was allegedly helpless in the intensive care unit for only three days.

In short, it does not matter whether RCW 4.16.190 incorporates the 1977 version of RCW ch. 11.88 or some later version. The Legislature never intended that a three-day inability to function while in the intensive care unit could qualify one for appointment of a guardian under RCW ch. 11.88.

C. PLAINTIFF'S OTHER ARGUMENTS ARE MERITLESS.

Plaintiff claims that the Legislature intended that litigants have a full three years in an unimpaired and rational state to bring suit. (Brief of Respondent 20-21) If this was all the Legislature intended, it would have simply said that the limitations period would be tolled if plaintiff was incompetent or disabled to such a degree at the time of accrual that he or she could not understand the nature of the proceedings. But that is not

what the Legislature said. The Legislature instead expressly qualified the terms "incompetent" and "disabled" by providing that incompetency or disability was to be "***determined according to chapter 11.88 RCW.***" (Emphasis added.)

Plaintiff also claims defendants were not prejudiced by her delay in instituting this lawsuit and that the bulk of the delay in this matter has been due to the stay in proceedings necessitated by the receivership of Dr. Muraki's insurance carrier. (Brief of Respondent 22) That the receivership stay delayed the suit after it was filed does not change the fact that the suit was filed late.

And whether the defendant is prejudiced is irrelevant to whether the statute of limitations bars a suit. In the seminal case of *Ruth v. Dight,* 75 Wn.2d 660, 453 P.2d 631 (1969), the Washington Supreme Court declared:

> There is nothing inherently unjust about a statute of limitations. . . . Statutes of limitation . . . thus contemplate that a qualified freedom from unending harrassment [*sic*] of judicial process is one of the hallmarks of justice. No civilized society could lay claim to an enlightened judicial system which puts no limits on the time in which a person can be compelled to defend against claims brought in good faith . . . .
>
> . . . .
>
> While it has been a long cherished ambition of the common law to provide a legal remedy for every genuine wrong, it is

> also a traditional view that compelling one to answer stale claims in the courts is in itself a substantial wrong. . . .

Id. at 664-65.

III. CONCLUSION

Plaintiff did not suffer incompetency or disability as determined according to chapter 11.88 RCW, regardless of which version of RCW ch. 11.88 applies. Consequently, she did not bring her suit in the time which the Legislature provided.

The trial court thus erred in denying defendants summary judgment. This court should reverse.

DATED this 23rd day of ~~November~~ March 2006.

REED McCLURE

By Pamela A. Okano
Pamela A. Okano WSBA #7718
Attorneys for Appellants

069237.097021/116675